signed as attesting witness to the execution of the agreements by the directors of the three companies.

A search in the Registry of Companies revealed the following: Of those original licensees, only 2 of the 10 allotted to Hayati remained as shareholders. Bertapak also had 2 of the 8 allotted to it. One of the other 6 had died however and it is not known what had happened to his allocation. The full complement of twelve remained with Sastiva, the two who had died being substituted by their personal representatives.

It is not however suggested that there is any significance in this as the rights of the licensees had passed to the companies and the question whether the respondent had acquired any rights over the timber area must be determined by an examination of the composition of the three companies. It will be sufficient to observe shortly that in Bertapak and Hayati, the shareholders and the directors include several persons with the same surname as the respondent. Quite a few of them reside at his address. The same is perhaps not true with Sastiva but the curious feature is that the directors reside at Pahang, but the registered office is in Kuala Lumpur and it had a Chinese secretary.

The only conclusion to be reached on this documentary evidence must be that the respondent had obtained the rights certain to the 10,800 acres given to Hayati and Bertapak. As for the 7,200 acres allotted to Sastiva, the respondent admitted that he knew that one Tan Seng Eng had obtained the licences issued to Sastiva and the documentary evidence in the three agreements made, two on September 7, and the third on September 12, 1973, is to the effect that whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the respondent and another, through the instrumentality of Au Ah Wah.

On all this evidence, we can only form one conclusion that Au Ah Wah had performed his contract with the respondent and as provided for in the March 31 agreement (which is the relevant one for construction in the determination of the rights and obligations between the parties) the rights of the appellant had accrued "on the performance of the said contract with Au Ah Wah." The other requirement in the contract was the issue of a first licence to fell 1,000 acres. The evidence of Harun bin Ismail, the Deputy Director of Forestry (PW3) was that at the date of hearing, 10,000 of the 18,000 acres had been worked. The obligation of the respondent to pay the appellants had therefore crystallised. It is true that the negotiations with the original licensees had to negotiate a further channel, but that did not alter the fact that the respondent came into the picture through the introduction of the appellants, nor the other fact just as clear, that throughout the weaving of the fabric, the hand of Au Ah Wah was seen.

For these reasons, the appeal is allowed with costs here and in the court below. Judgment will be entered for the plaintiffs as prayed.

Appeal allowed.

Solicitors: *Jackson & Masacorale; Yeow & Chin.*

COLLECTOR OF LAND REVENUE v. LOOI LAM

[F.C. (Suffian L.P., Chang Min Tat & Abdul Hamid F.JJ.) December 10, 1980 & February 13, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 238 of 1979]

Land law — Land Acquisition — Compensation for damage to property — Damage "likely to be sustained" — Whether can be awarded at time of reference to High Court — Land Acquisition Act, 1960, First Schedule paragraph 2(d).

In this case the Government acquired part of the land belonging to the respondent. The Government acquired an area of 15,540 sq. ft. and a further area of 4,005 sq. ft. not acquired was severed from the rest of the land. The land was required to change the course of the Sungai Benus which passed through Kampung Bahru. As a result of river deviation work done on behalf of the Government after acquisition, the house belonging to the respondent was badly damaged and required extensive repair. The Collector of Land Revenue made an award of compensation of (a) $54,390 for the land acquired and (b) $900 as disturbance money. No award was made in respect of damage to the house. The respondent was dissatisfied with the award and the matter was referred to the High Court. Vohrah J. confirmed the awards of the Collector under (a) and (b) and in addition awarded (c) $8,101 as compensation for damage sustained by reason of the severance of 4,005 sq. ft. from the rest of the land; and (d) $40,185 compensation for damage to the house. The Collector appealed against the award of compensation for the house. It was argued that the compensation, if payable, should have been the subject of a separate suit.

Held: as paragraph 2(d) of the First Schedule to the Land Acquisition Act, 1960, refers to the damage "likely to be sustained" by the person interested, the damages for injurious affection to the house in this case could be claimed and was rightly awarded in the course of a reference to the High Court under the Act.

Cases referred to:-

(1) *Collector of Dinagepore* v. *Girja Nath Roy & Ors.* I.L.R. 25 Cal. 346.

(2) *Cowper Essex* v. *Acton Local Board* (1889) L.R. 14 App. Cas. 153.

(3) *R.H. Wernicke* v. *Secretary of State for India in Council* 13 Calcutta Weekly Notes 1047.

(4) *His Highness The Gaekwar of Baroda* v. *Gandhi Kachrabhai Kasturchand* (1903) L.R. 30 I.A. 60.

(5) *Croft* v. *L. & N.W.Ry. Co.* (1863) 32 L.J. Q.B. 113; 122 E.R. 164.

The following cases were also cited in argument: *Biscoe* v. *Great Eastern Railway Company* (1873) L.R. 16 Eq. 636. headnote; *Tapidas Govindbhai* (1869) Bombay H.C.R. 116; *Collector of Dinagepore* v. *Girja Nath Roy & Ors.* I.L.R. 25 Cal. 346; *In re The Stockport, Timperley and Altringham Railway Company* (1864) 33 L.J. Q.B. 251; *R.H. Wernicke & Ors.* v. *The Secretary of State for India in Council* (1908) 13 C.W.N. 1046; *The Chairman, &c., of the Metropolitan Board of Works* v. *Owen McCarthy* Vol. VII, English and Irish Appeals (1874) 243.

FEDERAL COURT.

Dato' Haji Abu Mansor bin Ali (Senior Federal Counsel) for the appellant.

Roland Khoo for the respondent.

Suffian L.P. (delivering the judgment of the Court): Lot 412, Certificate of Title No. 13287, Town of Kuala Lumpur, is a large piece of land of approximately 1.994 acres in Kampong Bahru, upon which stood a large two-storey house No. 175, Jalan Raja Muda.

To change the course of the Sungai Benus which passed through Kampong Bahru, Government acquired part of it under the Land Acquisition Act, 1960 ("the

Act"). Government acquired an area of 15,540 square feet, which has accordingly been excised; and a further area of 4,005 square feet not acquired was severed from the rest of the land. As a result of river deviation work done on behalf of Government after the acquisition, the house was badly damaged and required extensive repair.

The Collector of Land Revenue heard the owner's claim on October 29, 1969, and on January 24, 1970, and in his award dated January 30, 1970, awarded compensation as follows:

(a) a sum of $54,390 for the 15,540 square feet acquired at $3.50 per square foot; and

(b) a sum of $900 as disturbance money.

No award was made in respect of the damage to the house. It is round this that controversy now centres.

The landowner was dissatisfied with the award and at her request the matter was referred under section 38 of the Act to the High Court; and on November 3, 1979, Vohrah J. confirmed awards (a) and (b); and further awarded

(c) $8,010 as compensation for damage sustained by reason of the severance of $4,005 sq. ft. from the rest of the land; and

(d) $40,185 compensation for the damage to the house.

The Collector accepted all the learned judge's awards, except award (d) which says that Government must pay compensation for the damage done to the house.

There is no dispute regarding market value of the land acquired, and none regarding the damage payable in respect of severance. The dispute now is regarding the compensation awarded in respect of the damage done by Government subsequent to the acquisition to the house which was never acquired and still belongs to the owner.

The Government contends that this compensation, if payable, should have been the subject of a separate suit. The owner contends (and the learned judge agreed) that it need not have been the subject of a separate suit and that it can be considered and awarded in the course of a reference under the Act.

The authority for holding that compensation is payable for the damage to the house is paragraph 2(d) of the First Schedule to the Act which provides:

"In determining the amount of compensation the court must take into consideration [among other things] the damage, if any, sustained or likely to be sustained by the person interested [i.e. the owner] at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner or his actual earnings."

Thus the point before us is a short and simple one: must damages for injurious affection to the house under paragraph 2(d) be sued for separately or may they be claimed and awarded in the course of the reference under the Act? This point has never been decided by the courts before.

The point is not merely of academic interest.

No claim was made at the enquiry before the Collector. It would appear that if it had been made, the Collector could, because of the words "likely to be sustained", award compensation for the damage done to the house.

In *Collector of Dinagepore* v. *Girja Nath Roy & Ors.*,[1] a piece of land belonging to the Maharajah of Dinagepore was acquired for the construction of a bridge; a bridge was constructed upon it and opened for traffic; and the Maharajah claimed compensation for the loss of his income derived from his ferry which was worked within a short distance of the spot on which the bridge had been constructed and within the limits of his estate. He relied on clause 4 of subsection (1) of section 23 of the Indian Land Acquisition Act which was almost like our paragraph 2(d). It provided that in determining compensation regard shall be had to:

"The damage (if any) sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, moveable and immoveable, in any other manner, or his earnings."

It was contended for the Collector that the claim was unsustainable because no action could have been maintained by the Maharajah in respect of the bridge if it had been opened without the authority of the Act, and because the damage sustained, if any, was attributable, not to the acquisition of the land, but to the user of it when the bridge had been constructed and opened.

The claim was allowed by a court of two judges. The court cited with approval the following passage from Lord Watson's judgment in *Cowper Essex* v. *Acton Local Board*[2]:

"A proprietor is entitled to compensation for depreciation of the value of his other lands in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

The Calcutta court also said at page 352:

"There is no limit as to the nature of the 'injuriously affecting' except in so far as this is provided for by the other clause of the section: the difficulty is as to the time when the damage is sustained.

The words 'at the time when the Collector takes possession of the land' cannot mean that compensation can only be given for the damage which had actually at that time been sustained without reference to a continuing damage caused by the acquisition."

Be it noted that our provision is stronger than the Indian, for ours provides that not only must regard be had to the damage actually sustained by the owner but also damage *likely* to be so sustained.

On the authority of the Calcutta case, it is plain that an owner is entitled to be compensated for damage that is sustained not only at the time of the Collector's taking possession of the land — on January 24, 1970, in the instant case — but also for damage likely to be sustained thereafter, i.e., such damage as can reasonably be expected at the time of the Collector's taking possession. This disposes of the argument of Datuk Mansor for the Government that the owner is only entitled to be compensated for the damage sustained at the time of the Collector's taking possession.

We think that it was unreasonable to expect the owner to submit the claim for damage to the house at the enquiry. Mr. Lee Yoke San, chartered surveyor and licensed appraiser, a witness for the owner, prepared a report on November 14, 1969, i.e. after the first day's hearing before the Collector, and said that he expected possible damage to the house as a result of the deviation work but that it was not possible then to assess the extent of the damage and the amount of compensation to be paid for it. The Collector took cognisance of Lee's report at the subsequent hearing on January 24, 1970.

So, in any event the Government had notice of the owner's claim for injurious affection at that stage.

Datuk Mansor submitted that Government was expecting to be sued by the owner for the damage done to the house; and if she had done so, Government could have protected their interest, because they still held some retention money owing to the contractor who had done the river deviation work, and Government could probably somehow involve the contractor, who, it was said, was an independent contractor for which Government was not vicariously liable. The owner did not sue, and so Government released the retention money to the contractor, thus losing their hold over him.

To allow the owner to pursue her claim in the course of the reference which was not heard until May 30, 1978, i.e. nearly eight years after the completion of the river deviation work on December 12, 1970, was, Datuk Mansor argued, unfair to Government; because by then any suit by the owner would certainly have been time-barred under the Public Authorities Protection Ordinance, 1948, which prescribed a one-year time limit, and allowing consideration of this claim in the course of the reference was tantamount to reviving a time-barred cause of action. What the owner should have done, it was submitted, was to sue Government separately for this damage.

With respect we do not agree. In our judgment the learned judge was right in ruling that the owner need not have sued separately for this damage and that the court has power to consider and adjudicate on her claim in the course of the reference. With respect we agree with the law stated by the Calcutta court in *R.H. Wernicke* v. *The Secretary of State for India in Council.*[3]

There Government acquired part of a tea garden for the purpose of extending a rifle range near Darjeeling. The owners were left with about 8 acres of tea land behind the butts where it was extremely unsafe to work when firing was going on. They claimed injurious affection of these 8 acres. Counsel for Government opposed the claim, arguing that any damage should be the subject of a suit. Richardson J. at pages 1059 and 1060 disposed of this argument as follows:

"There remains the claim for injurious affection which is laid as Rs.2,540. It is said that the rifle range will interfere, with the working of 8 acres of land behind the butts and I think that there can be no doubt as to this. It will not be safe to put coolies on the land when the range is being used. Mr. Sinha for the Government contended that the contemplated injury was contingent, that it could only arise from the negligent use of the range and that the tea garden was not entitled to compensation now but would be entitled to a remedy by suit when the injury occurred. The case to which he referred *His Highness the Gaekwar of Baroda* v. *Gandhi Kachrabhai Kasturchand*[4] is not an adequate support for this proposition and the learned counsel for the claimants cited good authority for the view that the tea garden is entitled to compensation now even if the injury which is contemplated be of the nature of an actionable nuisance (Land Acquisition Act, section 23, clause fourthly) *Croft* v. *L. & N.W. Ry. Co.*[5] and *Cowper Essex* v. *The Local Board of Acton.*"[2]

As to Datuk Mansor's argument that to allow consideration of the owner's claim in the course of the reference was tantamount to reviving a time-barred claim, it cannot be said that the owner has been guilty of delay at all. The Collector made his award on January 30, 1970; and the owner promptly by Form N asked for her objection to be referred to the High Court. This form, be it noted, was dated March 4, 1970, one month and a few days later and certainly well within the one-year limit prescribed by the Protection of Public Authorities Ordinance, 1948. Moreover, as can be seen from this Form at page 28 of the appeal record, the owner specifically gave notice that she intended to make a claim under paragraph 2(d) of the First Schedule.

An additional reason for holding that the owner's claim under this paragraph may be considered in the course of the reference is the absence from the Land Acquisition Act, 1960, of a section corresponding to section 31 of the F.M.S. Land Acquisition Enactment (F.M.S. Cap. 140) which provided that when an owner had made a claim to the Collector, the High Court in a reference might not award a sum exceeding the sum so claimed: this implies that the Legislature when enacting the Act desired to let the High Court have in a proper case a free hand to award more than the sum claimed before the Collector. What case can be more proper than this one where at the time of the enquiry there was only the possibility of damage and soon after the completion of the river deviation work there was indeed damage and extensive damage at that?

Finally, it is in the public interest that as many related matters in controversy as possible should be ventilated and determined in the same proceedings — to save time and costs.

For the above reasons, we would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*